SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

The Steamship "STYRIA,"
ANTONIO G. SCOPINICH, Master,
Claimant-Appellant-Petitioner,

AGAINST

JAMES L. MORGAN, and others,
Libellants-Appellants.

AUSTRO-AMERICANA STEAMSHIP COMPANY,
Libellant.

AGAINST

3250 cantars of brimstone *ex* Steamship "ABBAZIA,"
JAMES L. MORGAN and others,
Claimants-Petitioners.

No. 72.

On writs of *certiorari* from the Circuit Court of Appeals for the Second Circuit.

BRIEF FOR MORGAN.

The first suit above is one of four brought by the owners of brimstone shipped on board the steamship *Styria* at Porto Empedocle, Sicily, in April, 1898, for failure to transport the brimstone to the port of New York, and there deliver it in accordance with the terms of the bills of lading. Subsequently, by stipulation between the parties, the brimstone was brought over by the *Abbazia*, another steamer belonging to the Austro-Americana Steamship Company, which is the owner of the *Styria*, and upon its arrival in New York it was proceeded against upon four libels by that Company, of which the second suit above is one, for expenses incurred in landing and storing in Sicily.

The *Styria*, which is an Austrian vessel, arrived at Porto Empedocle (Girgenti), on April 21st, 1898, on a voyage from Trieste to New York via Sicilian ports. She began taking in a cargo of brimstone on the 21st, which day, according to the President's proclamation, marked the beginning of a state of

war between the United States and Spain (The *Pedro*, 175 U. S., 354). She finished loading brimstone on April 25th (fol. 396), and cleared at the Custom House on that day, or the 24th (fol. 409). Bills of lading were issued, containing, among other exceptions, the following:

(*a*) "Restraints of Princes and Rulers of People."

Fol. 742.

(*b*) "In case of blockade or interdict of the port of discharge, or if without such blockade or interdict, the master shall consider it unsafe, for any reason, to enter or discharge cargo there, he is to have option of landing the goods at any other port which he may consider safe, at shipper's risk and expense; and on the goods being placed in charge of any mercantile agent or of British consul, and a letter being put into the Post Office, addressed to the shipper and consignee, if named, stating the landing and with whom deposited, the goods to be at the shipper's risk and expense, and the master and owners discharged from all responsibility."

Fols. 756-7.

(*c*) "With liberty (in event of steamer putting back to this or into any other port or otherwise being prevented from any acts from commencing or proceeding in the ordinary course of her voyage) to ship or tranship the goods by any other steamer."

Fols. 743-4.

(*e*) "With liberty either before or after proceeding towards the port of discharge to proceed to and stay at any port or ports whatsoever."

Fol. 760.
See also Opinion of District Court, fols. 934-6.

On April 25th, the Queen Regent of Spain issued a proclamation of war, in which sulphur was declared contraband of war. The same day the master of the *Styria* received a telegram from Burrill and Sons of London, managing agents of the owners of the *Styria*, directing him "to discharge whole cargo as quickly as possible" (fols. 456-7). On April 27th the master began to discharge and warehouse the brimstone, notifying the shippers that he did so "on finding risky my

passage to New York, with the actual sulphur cargo, for facts of war" (fols. 426-7 & 437). The shippers protested (fol. 446); but the master continued the discharge, which was completed on May 7th (fol. 439), when the ship cleared and proceeded the next morning (fol. 447) to Messina and Palermo, at which ports she took on a cargo of fruit and sailed from Italian waters May 9th for New York, where she arrived June 3d (fol. 448).

Almost immediately after the proclamation of the Queen Regent, negotiations were opened by the Italian Government to secure a modification of its provisions, so that sulphur should not be regarded as contraband of war. These negotiations were reported daily in the Giornale di Sicilia, a newspaper published at Palermo, and were read by the captain of the *Styria*.

> See extracts from Giornale di Sicilia, dated April 24-5, 26-7, 27-8, 29-30, May 1-2, 3-4, 5-6 and 7-8, Record, pp. 214-7.
>
> Also stipulation, which contains admission that these issues of the newspaper "were read by the captain of the *Styria*," Record, fols. 801-2.

Also stipulation, which contains admission that these issues of the newspaper "were read by the captain of the *Styria*."
Record, fols. 801-2.

The negotiations were successful, and in the issue of May 5-6 there was published an official declaration from the Italian Minister of Agriculture, Industry and Commerce, "that the Spanish Government has given notice to the commanders of its vessels to let sulphur pass free" (fols. 862-4).

Both the District Court and the Circuit Court of Appeals decided the cases on the merits in favor of the merchants and against the ship.

The opinion of the District Court will be found at pages 232-9 of the Record.

The opinion of the Circuit Court of Appeals will be found at pages 338-350 of the Record.

The learned District Judge held that the "commencement

of the discharge on the 27th (April) was too hasty and precipitate" (Record, fol. 945).

He found "that the ship was not justified * * * in discharging and storing the cargo on account of the shippers, as she did, between April 27th and May 7th; that by the 10th of May there was reasonable assurance that it would be safe to go on with the voyage, and that this was not an unreasonable time for the ship to wait under the facts and circumstances currently known in Sicily at that time" (fol. 947).

The District Court therefore dismissed the libels of the Steamship Company for charges and expenses.

On the question of damages the District Judge interpreted the clause of the bill of lading which limited recovery to the invoice value of the goods, to mean that the invoice value was "the basis of settlement of any loss or damage" (fol. 1177). Accordingly, he held that the libellants could recover only the difference between the invoice value of the brimstone and the proceeds of its sale, which, in the case of Morgan, amounted to $144.92 (Commissioner's Report, pp. 274-8). The damages claimed by Morgan amounted to $3,410.92 (Report, fols. 1039-1040, 992, 999 and 1012), which is the difference between the value of the brimstone in New York on June 3d, 1898, when the *Styria* arrived, and the proceeds of the brimstone when sold in October *ex* steamship *Abbazia*.

Both sides appealed to the Circuit Court of Appeals, the shipowner on the merits, the merchants on the damages. The Circuit Court of Appeals modified the decision on the merits, holding that the master did right in discharging the cargo, but that it was his duty to re-load on learning that it was to be treated as free. Accordingly, the Appellate Court allowed the ship to recover the proper expenses of discharging and reloading at Porto Empedocle.

The Circuit Court of Appeals reversed the District Court on the question of damages, holding that the bill of lading merely "fixes a final limit of liability beyond which he (the shipowner) shall not be required to respond; it does not profess to regulate the calculation by which a loss is to be ascertained if such loss is less than the limit."

Record, pp. 349, 350.

The shipowner having applied to the Circuit Court of Appeals for a re-hearing (Opinion, pp. 352-9), the Court granted a re-argument solely on the question of the effect of the stipulation entered into betwen the parties *pendente lite* as to bringing forward the cargo.

See Opinion on re-argument, p. 360.

Re-argument having been had, the Circuit Court of Appeals denied the petition to modify the mandate.

See Opinion, pp. 363-4.

Thereupon, the shipowner applied to this Court for writs of *certiorari* in the suits against the *Styria,* which were granted on October 16th, 1900 (Record, p. 378).

Later, on November 12th, 1900, this Court granted cross-writs on the application of the merchants in the suits for charges, and directed that the petitions be filed with the original petitions (Morgan *v.* Austro-Americana S. S. Co., and three other cases, 179 U. S., 685).

POINTS.

I.—The decision of the District Court on the merits was right and should be sustained.

There is no dispute on the facts. The only witness examined on the merits was Captain Scopinich, master of the *Styria.* The rest of the evidence was documentary. Both the District Court and the Circuit Court of Appeals agreed in their findings of fact. Nor was there serious difference between the lower Courts as to the rights of the parties under the bills of lading. The main difference between the two Courts was in the conception of the duties of the master in the circumstances. The learned Circuit Judge who wrote the opinion of the Circuit Court of Appeals failed to appreciate the obligation resting on the master.

The District Judge stated this obligation thus:

"The master as the agent of all concerned is bound to a

prudent regard for the interests of the cargo and 'must endeavor to hold the balance evenly' between ship and cargo, when their interests conflict. The *Julia Blake,* 107 U. S., 418," and other cases cited.

Opinion, Judge Brown, fol. 942.

" The discharge and storage of the cargo, however, was an act necessarily involving considerable expense to the shipper or consignee; and before imposing such an expense upon the cargo, the master, in my judgment, was bound, in view of the daily reports of current negotiations and the expectations of the exception of sulphur, to wait a reasonable period for satisfactory assurances in that regard. No doubt any delay entailed some loss upon the ship, and what should be deemed a reasonable period ought to be determined with reference to the circumstances and interests of both. But, taking the circumstances altogether, I am of opinion that the commencement of the discharge on the 27th was too hasty and precipitate; and that the master was guided in that matter by the telegram from Burrell & Son, the managing agents in London, rather than by his own judgment on all the circumstances known to him at the time. Had he been left to exercise his own judgment, I do not think, upon the testimony, that he would have discharged the cargo—especially not at the time he did; and that before he left Italy, although there was no formal publication of the exception of sulphur, there were such informal assurances coming from the Spanish Government as left no reasonable apprehension of danger from sailing with a sulphur cargo."

Fols. 944-6.

We submit that Judge Brown's statement of the duties of the master is in harmony with the leading decisions of the Admiralty Courts.

In the case of the *Gratitudine* (3 C. Rob., 240, 261), Lord Stowell said:

" Suppose the cargo to be not instantly perishable, but that it can await the repair of the ship, what is the master to do in the situation before described, being a stranger in a foreign port, in a state of distress, without an opportunity of communication with the owners or their agent? What is his duty under such circumstances? It may be answered, generally, to look out for the means of accomplishing his contract, if possible; that is, the safe conveyance of the property intrusted to his care, in that same vehicle which he had contracted to furnish."

The duty of the shipmaster to care for cargo in extraordinary cases is well stated by Sir Robert Phillimore in the *Onward* (L. R., 4 Adm. & Eccl., 38, 57):

"The next consequence from the doctrine of agency is that the master must sustain, to the best of his power, the interests of the absent owner. This is a principle of general maritime law and not like the former one of English law only. Boulay-Paty observes: 'Il est le représentant des chargeurs absens; il doit faire ce qu'ils feraient eux mêmes s'ils étaient sur les lieux.' Cours de Droit Commercial Maritime, tom. 2, p. 404, ed. 1834—that is, he must do what there is fair reason to suppose the owner, if present, would do. 'Il est donc' (Emérigon says) 'obligé de faire ce qu'il est à présumer que feraient les chargeurs s'ils étaient présens,' quoted by Boulay-Paty, Cours de Droit Commercial Maritime, tom. 2, p. 403, ed. 1834."

In the exhaustive statement of this duty of a shipmaster to care actively for the cargo interests, the English Exchequer Chamber approved the German Code, which expressly requires a master to reclaim cargo, in case of capture and detention, and to take all extra-judicial or judicial steps for its recovery, if otherwise taken out of his charge.

Notara *v.* Henderson, L. R., 7 Q. B., 225, 234.

Even when excepted perils may have required the goods to be landed and stored, the carrier cannot leave them and abandon the voyage.

The *Maggie Hammond*, 9 Wall., 435.

The Circuit Court of Appeals did not recognize the duty resting on the master in reference to the cargo. They say:

"Both nations had united in proclaiming to the whole world that they were at war, and we know of no reason why the master of any vessel of a neutral nation was bound to wait twenty-four hours, or twenty-four days or twenty-four weeks, to see if the two belligerents would not settle their differences."

Opinion, C. C. A., p. 344:

"When two nations formally proclaim the existence of a state of war between themselves with all the solemnity observed in this instance, it would seem to be going too far to say that parties whose contracts are affected thereby should wait some

indefinite time, which a court shall find reasonable, in a vague expectation that the belligerents may think better of it and make peace."

Opinion, C. C. A., 345.

Neither of the above statements has any fair application to the circumstances of the cases at bar. The very day that the master of the *Styria* finished loading his cargo, April 25th, 1898, the Giornale di Sicilia, in the issue of 24-25 April, announced that the Italian Minister for Foreign Affairs had promised to telegraph to the Italian Ambassador in Madrid to obtain from the Spanish authorities the exclusion of "brimstone from being considered contraband of war in the Spanish-American conflict."

Malcomson, Ex. D, 19, p. 2214.

One week later, in the issue of 1-2 May, the Giornale di Sicilia announced, in the form of a dispatch from its correspondent in Rome, that the Spanish Government had "determined to exclude brimstone on the list of contraband of war." A further dispatch from Rome published in the same issue was as follows:

"ROME, 1. The 'Official Gazette' will publish the decision regarding brimstone. Meantime the Spanish Government has already ordered the commanders of its ships to allow brimstone to pass free. Several Sicilian deputies who went to the Consulta received full confirmation of what I telegraph you."

Malcomson, Ex. D 23, p. 215.

The next issue of the Giornale announced that the Consulta had decided not to publish in the Official Gazette the Spanish Government decision:

"But the Minister of the Interior sent a circular to all the Prefects in Sicily informing them of the Orders relative to the free navigation of cargoes of Brimstone."

Malcomson, Ex. D 24, p. 216.

The next issue of the Giornale, that of 5-6 May, contained an official announcement by the Italian Minister of Agriculture, Industry and Commerce that "in consequence of our request,

the Spanish Government has given notice to the commanders of its vessels to let sulphur pass free."

Malcomson, Ex. D 25, p. 216.

All these papers Captain Scopinich read.

See Stipulation, fol. 802.

The Circuit Court of Appeals states that not until May 6th did any of the reports bear the stamp of authority (p. 546); but in this the Court is mistaken. It was on the 29th of April that the commanders of Spanish ships were directed to allow brimstone to pass free. We have three independent pieces of evidence of this.

1. The announcement is made in the Giornale di Sicilia of 1-2 May (fols. 859-860).

2. In a letter to the Secretary of State, Mr. Iddings, of the U. S. Embassy in Rome, states that he has obtained the following information from the Italian Foreign office:

"The verbal communication made to the Royal Ambassador (at Madrid) concerning the orders given to the commanders of Spanish ships to respect sulphur, was made on April 29, 1898."

Malcomson, Ex. 18, fol. 851.

3. In a letter to the Secretary of the Newcastle Protection and Indemnity Association (*Styria*, Ex. D 16, p. 211) Mr. Villiers, of the British Foreign Office, says that on May 6th, "as a result of representations made by Great Britain and Italy, the Spanish Minister for Foreign Affairs, *who had previously informed* the Italian Ambassador in the same sense, verbally stated to Her Majesty's Ambassador at Madrid that while the decree of April 23d could not be altered, orders would be given to the Naval Departments, as a temporary measure, not to treat sulphur as contraband of war" (fol. 842.) The words italicized show that the Italian Ambassador had received information from the Spanish Foreign office previously.

It is thus perfectly clear that the positive statement published in the Giornale di Sicilia of 1-2 May, that the Spanish Government had already ordered the commanders of its ships to allow

brimstone to pass free, was authoritative—as authoritative as the telegram from the Minister of Agriculture, Industry and Commerce published in the issue of May 5-6 (Malcomson, Ex. D, p. 25). At least five days before the brimstone was discharged, the master of the *Styria* knew that there was no need of discharging it. Certainly this was, as Judge Brown said, "too hasty and precipitate."

II.—The expenses incurred by the master of the ship in discharging, storing, and re-loading the cargo were properly disallowed by the District Court and improperly allowed by the Circuit Court of Appeals.

If the District Court was right in its view of the duty of the master, then there was no excuse for discharging the cargo without waiting a reasonable time to ascertain the result of the negotiations which he knew were pending.

His own excuses for the discharge are insufficient. His first statement was that he discharged the brimstone under instructions from his managing owners.

"Q. What was the reason for putting it ashore? A. I acted according to instructions" (fol. 411).

"I did not act on my own judgment.

"Q. Not at all? A. No" (fol. 457).

Later he testified as follows:

"The principal reason was because I was ordered; and, secondly, that I had the bill of lading clause that fully authorized me when I deem it not safe to proceed with the cargo that was declared contraband of war" (fol. 492).

The day that he began the discharge, April 27th, the master wrote to the Austrian Consul as follows:

"Please take notice that by order of the representative of my owners, for facts of war, I am discharging the Austrian Steamer *Styria*, commanded by me, at expense and risk of whom it might concern, under care of the mercantile agent," etc. (fols. 431-2).

The shippers protested. Captain Scopinich says:

"I received protests a couple of days after starting the discharge—two or three days after we commenced unloading, and on one occasion I received a telegraphic protest" (fol. 446).

On May 2d, Sofio & Company of Messina, as representatives of the libellants Morgan, served upon the master a formal protest on account of his having discharged and deposited their sulphur in Porto Empedocle.

Record, p. 193, fols. 770-2.
Scopinich, fol. 466.

On May 5th, Captain Scopinich replied by a protest in which he said:

"Petitioner in discharging cargo proceeded as was his right and in the interest of the goods. This is confirmed by the fact published in the papers and discussed on the Italian parliament, that sulphur had been declared contraband of war by one of the fighting nations." He further protested "against all delay, expenses and damages which they suffer through the obstinacy of Messrs. John Sofio & Company, and asks them to reimburse all expenses of discharge," etc.

Styria, Ex. B1, fols. 779-781.

On May 17th proceedings were begun in Captain Scopinich's behalf to sequestrate the sulphur for the expenses incurred.

Styria, Ex. B, pp. 194-5.

From these documents and the testimony of Captain Scopinich it appears:

(1) That the master discharged the sulphur under the instructions of the owners of the *Styria*.

(2) That the shippers protested against the discharge.

(3) That the master knew of the negotiations between the Italian and Spanish Governments.

(4) That before the master had completed the discharge of the sulphur at Porto Empedocle these negotiations had been successful and the master had read in the newspapers that the

Spanish Government had agreed not to treat sulphur as contraband of war.

(5) That the alleged "facts of war" were not such as to justify the master in discharging the brimstone when he did, and that none of the clauses of the bill of lading relied upon gave him the right to do so.

The blockade clause of the bill of lading has no application to the port of shipment. It provides that "in case of blockade or interdict of the port of *discharge*, or if * * * the master shall consider it unsafe for any reason to enter or discharge the cargo *there*, he is to have the option of landing the goods," etc., etc.

If the master discharged the brimstone under the blockade clause, the discharge was wholly unjustified.

The transhipment clause of the bill of lading is equally unavailing. Judge Brown says:

"And any such transhipment being at her own option and for her own convenience, all the expenses of discharge, storage and re-shipment would fall upon the ship, as in any other case of a transfer and re-shipment under clause (c)."

Opinion, fol. 951.

III.—Damages.

The Circuit Court of Appeals sustained the contention of the merchants that the District Court erred in the rule it laid down as to damages.

The limitation clause of the bill of lading is as follows:

"The Shipowner is not to be liable for any damage to any Goods which are capable of being covered by insurance, nor for any claim, notice of which is not given before the removal of the goods, nor for claim for damage or detention to goods under Through Bills of Lading where the damage is done or detention occurs whilst the goods are not in the possession of the Shipowner, *nor in any case for more than the invoice or declared value of the goods, whichever shall be the least.*"

Fols. 753-754.

The Commissioner, who assessed the damages, felt himself bound by the rulings of the learned District Judge in previous cases and made a report allowing the libellants only the difference between the invoice value and the net proceeds of sale, $144.92.

Record, fols. 1011-2.

The libellants excepted to this report on the ground:

1. That "the Commissioner adopted an erroneous method of assessing the damages, the true measure of damages being the difference in value of the sulphur at the time and in the place it should have been delivered, viz: June 3d, 1898, at New York, and at the time of its actual delivery in October, 1898."

2. "That he erred in holding that the clause in the bill of lading limiting the liability to the invoice or declared value of the goods was applicable to the case."

3. That "if the said clause does apply the Commissioner erred in his interpretation of it, the true meaning of the clause being that cargo owners may recover up to but not beyond the invoice value of their goods."

Libellants' Exceptions, p. 284.

The exceptions were overruled by the District Judge, who said: "By the contract of the bill of lading, the invoice value is the *basis* of settlement of any loss or damage."

Opinion of Judge Brown, p. 295.

From the decree so far as it awarded only $144.92 damages, the libellants appealed to the Circuit Court of Appeals (p. 306); and in their assignments of error raised the question of the method of assessing damages and the application of the limitation clause of the bill of lading.

Assignments of error, p. 322.

The Circuit Court of Appeals reversed the District Court, saying:

"We are unable to concur in the interpretation put upon

this clause, for the reason that the language used does not seem to import any such idea. The statement that the shipowner shall not be liable in any case for more than the invoice value of the goods is a simple and straightforward one; grammatically construed it fixes a final limit of liability beyond which he shall not be required to respond; it does not profess to regulate the calculation by which a loss is to be ascertained, if such loss is less than the limit. To give them such a meaning would seem to be to substitute for the contract the parties have made another and different one, which they might easily have made for themselves, had they wished to do so."

Opinion C. C. A., pp. 349-350.

We contend:

1. That the clause of the bill of lading has no application in a case like the present of refusal to deliver.

2. That if the clause did apply in the present suits, the interpretation put upon it by the Circuit Court of Appeals was right and that of the District Court was wrong.

1. The clause has no application in the present case.

An examination of the clause of the bill of lading shows that the limitation of liability to the invoice value is not designed to meet a case of total loss or non-delivery. What it says is that "the shipowner is not to be liable for any *damage* to any goods, etc., * * * nor for any claim" (that is, claim for *damage* to goods), "notice of which is not given, etc., * * * nor for claim for *damage or detention to goods* under through bills of lading where the *damage* is done or *detention* occurs, etc., * * * nor in any case" (that is, in case of *damage* or *detention*) "for more than the invoice or declared value of the goods, whichever shall be least."

Fol. 753.

The suits against the *Styria* are not brought to recover for *damage* to goods nor for *detention* of goods. They are brought for the refusal of the shipowners to deliver the goods at all. If the ship, after loading, had taken the goods to Bombay or Cape Town instead of delivering them at New York to the consignees,

could the shipowner have claimed that his liability was limited to the invoice value of the goods? Such a breach of the contract would have taken the shipment out of the purview of the bill of lading and the shipowner would not have been able to avail himself of any exceptions in the bill of lading.

The fact that the goods were brought forward to New York in September by another steamer and delivered to the libellants under the stipulation of August 12th does not change the nature of the suits.

We have interpreted the bill of lading strictly, but we have a right to do so. Words of exception and limitation must be construed most strongly against the party for whose benefit they are introduced.

Compania La Flecha *v.* Brauer, 168 U. S., 104, 118.

In the case of Calderon *v.* The Atlas S. S. Co. (170 U. S., 272), the bill of lading provided that "the carrier shall not be liable for goods * * * of any description above the value of $100 per package unless the bills of lading are signed therefor with the value therein expressed and a special agreement is made."

The steamship company insisted that the words of this clause "which are above the value of $100 per package" should be construed as if the words used were "beyond the sum or value of $100 per package." Although the lower courts agreed in putting this interpretation upon it, this Court said:

"But this certainly does violence to its language. If it had been intended to so limit the respondent's liability it would have been easy to say so" (p. 279).

And again, on p. 281, Mr. Justice Brown said:

"In this case the contract is one prepared by the respondent itself for the general purposes of its business. With every opportunity for a choice of language, it used a form of expression which clearly indicated a desire to exempt itself altogether from liability for goods exceeding $100 in value per package, and it has no right to complain if the Courts hold it to have intended what it so plainly expressed."

Moreover, as the improper discharge of the brimstone at the

port of shipment was an act *personal* to the shipowner, the limitation clause has no application.

The purpose of such a clause is to limit the liability of a shipowner for acts of his sea servants upon the voyage. If the fault is with the owner or his land agents, clauses like these have no application. *A fortiori* they do not shelter the carrier in a wilful conversion. In all such cases the invoice value clause has no application because relating only to matters "occurring on the voyage."

In Tattersall *v.* National S. S. Co., 12 Q. B. D., 297, where the bill of lading for cattle protected the shipowners by providing that "under no circumstances shall they be held liable for more than £5 for each of the animals," the Court held that this applied only to occurrences during the voyage, and not to the duty to have a fit ship.

The like principle is laid down by the French Court of Cassation.

Cie. Transatlantique *v.* Devoto (see Appendix).

2. But if the clause were applicable in the present suits, the District Court erred in its interpretation of the clause.

Judge Brown made the words "not to be liable * * * for more than the invoice * * * value," equivalent to "all claims to be settled on the basis of invoice value."

Opinion of Judge Brown on exceptions, p. 295.

This interpretation of the bill of lading "certainly does violence to its language." The language of the bill of lading is perfectly clear that the shipowner is not to be liable in certain cases "for more than the invoice or declared value of the goods." In other words, no matter what damages the merchant may have sustained, he can in no case recover more than the invoice or declared value of his goods. Or, to put it in another way, the damages should be assessed according to the established rules of law, and if they exceed the invoice or declared value of the goods, then recovery must be limited to that invoice or declared value.

As the meaning and effect of this clause have not been passed on by this Court, nor until the present decision by any Circuit

Court of Appeals, it is proper to refer to the cases relied upon by the District Judge.

In the case of the *Hadji* (18 Fed. R., 459) Judge Brown had before him a bill of lading which provided that in case of damage, loss or *non-delivery*, the shipowners are not to be liable for more than the invoice value of the goods. The Commissioner adjusted the damages upon the basis of 6½ cents per yard as the market value of the goods at the port of destination if uninjured. Exceptions were filed on the ground that the allowance should have been 5 cents, the invoice price, and Judge Brown allowed the exceptions.

In the case of the *Lydian Monarch* (23 Fed. R., 298) where some bales of burlap were injured through negligence, Judge Nixon of the New Jersey District followed the decision of Judge Brown in the *Hadji*, saying that the stipulation of the bill of lading was in the exact words of the contract in that case, and adding:

"The amount due must be adjusted upon the above principle of computation, and if it should turn out that if the libellant has received from the sale of the damaged goods the invoice price after deducting the costs of importation, sale, etc., the libel will be dismissed."

In the case of Pearse *v.* Quebec S. S. Co. (24 Fed. R., 285), which was another phase of the *Hadji* case, Judge Brown held that on a partial injury the damage is to be computed on the basis of the invoice value of the goods damaged, their net proceeds being credited against their invoice price and freight, the carrier to be held for the difference only.

Although the *Hadji* was affirmed by the Circuit Court (Judge Wallace) this question of damages does not seem to have been raised.

The *Hadji*, 20 Fed. R., 875.

There is one other Circuit decision, the *Alene* (25 Fed. R., 562) where Mr. Justice Blatchford, holding the Circuit Court, sustained a similar exception. The District Court had allowed the market value of oranges frozen, less the freight. Judge Blatchford limited the recovery to the invoice value and deducted the freight from that.

We contend that these decisions are erroneous, and we ask this Court to affirm the decision of the Circuit Court of Appeals on the question of damages and give to the plain language of the exception its fair meaning.

In the case of Brown *v.* Cunard S. S. Co. (147 Mass., 58) Mr. Justice Holmes stated the law as we believe it to be. He refused to follow the decisions of Judge Brown and Judge Nixon and said:

"The damages are to be ascertained in the usual way by finding the difference in value between each package as damaged and the same undamaged, and these damages are to be paid by the defendants up to but not exceeding one hundred pounds, when the value is not declared, or, in this case, up to but not exceeding the invoice value. As the damage to plaintiff's walnuts did not exceed the invoice value, the defendant must pay the whole amount."

III.—The stipulation of August 12, 1898, did not modify the ship's liability.

After the decision of the Circuit Court of Appeals application was made for a re-argument, which was granted upon the question of the effect of this stipulation (Record, p. 60). The Court refused to alter its decision, and in a brief opinion (pp. 363-4) stated clearly what the real purpose of the stipulation was.

At the time the stipulation was executed libels had been filed against the *Styria* claiming $69,800. The claimant had given security in the sum of $42,500, the appraised value of the steamship.

The war was virtually over. The sulphur was lying in warehouse in Sicily. The trial of the suits for damages was in the remote future. No answer had then been filed by the claimant. None was filed until December 1st, 1898.

The stipulation provided that the claimant should forward the sulphur to the consignees and deliver the same on payment of the freight specified in the original bills of lading; "the goods upon arrival to be sold at current market rates, and the

proceeds, less charges incurred, to be credited on account of the damages, if any, recovered by the libellants."

The stipulation gave the claimant a lien on the sulphur for the expenses of discharging, storing, etc., provided it should be found by the Court that the claimant was justified in re-landing and storing the cargo, as and when he did.

The remainder of the stipulation is as follows:

"It is the purpose and intent of this paragraph of the stipulation to provide that if the claimant was justified in re-landing and storing the cargo as and when he did, he shall have a lien upon the respective consignments for their respective proportions of the charges and expenses against the same, which the libellants would have to pay (exclusive of the charges provided for in the first paragraph of this stipulation), if they undertook to forward the cargo for their own account.

"3. This stipulation, and anything done by any party under it, shall be deemed to be wholly without prejudice in the pending suits, except as herein provided."

The owner of the *Styria* was under a liability of a peculiar character. Being guilty of fault in having discharged the brimstone or in not re-loading it after the proclamation against brimstone had been withdrawn, he was still custodian of the goods and under an active duty to forward to destination.

Its breach of contract having left the owner of the *Styria* unprotected by any of the exceptions of the original bill of lading, in the absence of express authorization from the cargo the claimant became an insurer—under an absolute liability—until the delivery should be made at New York.

The parties to this stipulation were simply arranging to end the deadlock at Porto Empedocle. The consignees wanted the brimstone or its value; the shipowner wished to recover freight, and all proposed to stop the running of warehouse charges and expenses..

The petition for rehearing intimates that if no such stipulation had been made, the claimant could have brought the goods on, appropriated to itself the market value here, and been answerable only for invoice value.

The petition contains the following statement:

"If the shipowner had not brought the cargo forward at all,

and had been adjudged to pay damages for its non-delivery, the damages would have been limited by the invoice value, and the shipowner would then have been entitled to the sulphur. He could have brought it forward himself and sold it in this market, for the price at which the libellant sold it, and the proceeds of the sale would have substantially paid the judgment for damages."

Record, p. 357.

So in their brief in this Court the counsel for the *Styria* contend that by a species of subrogation on paying the invoice value of the brimstone to the libellants, the owners of the *Styria* would have become entitled to sell the brimstone for their own profit.

Brief for *Styria*, pp. 99-107.

In other words, counsel would maintain that the "invoice value" clause gives the shipmaster an option. His duty to care for cargo is not that single, clear, and disinterested obligation that, according to Lord Stowell, rests upon the master. He may appropriate the goods, if he please, and then coolly offer the invoice value as the only compensation. This option extends even after the goods are out of the ship and the master has become the special agent *ex necessitate* of absent cargo owners!

To such an uncandid and ridiculous contention there are abundant answers.

1st.—Any such clause that would give the vessel the right to use and appropriate the advance in market value of another's property—to claim an offset by reason of it—even if clearly set forth in the contract—would be void as contrary to public policy.

In the case of Pearse *v.* Quebec Steamship Co., 24 Fed. R., 285, 288, Judge Addison Brown said that if it were attempted "to charge against the invoice value of the whole, the amount realized in a foreign market for the whole cargo, damaged and undamaged, that construction would be giving to the carrier the full benefit of the foreign market value which is expressly denied to the shipper—a result not presumably within the intention of the parties." * * * "If the construction contended

for by the claimant were the proper meaning of this limiting clause, it would be void upon grounds of public policy, as unreasonable, and *as affording a direct encouragement to the theft or non-delivery of the shipper's goods.*"

2d.—The principle of *ejusdem generis* requires that the clause here be applied to loss or damage, *i. e.*, the injury or deterioration of the goods. It would not apply to sound cargo, which by reason of advance of market the carrier should elect not to deliver, and then claim to make the owner submit to invoice value as the limit of compensation.

3rd.—The invoice value clause would not have permitted the claimant to refuse to do his duty at the time of this stipulation. On the contrary, the law had cast on the claimant a special obligation independent of contract to care for, protect, and bring forward the cargo, and held up as a standard of liability for the breach thereof an undiminished responsibility for the full market value which the cargo would have realized had it been forwarded on the *Styria*.

4th.—The duty of the master to care for cargo in an emergency transcends any words of a bill of lading. No clauses inserted by the shipowner can be suffered to impair its full obligation. In the case of Ralli *v.* Troop, 157 U. S., 386, 397, this Court, speaking by Mr. Justice Gray, said:

"The authority of the master may be treated as resting either on implied contract of the parties, or on the duty imposed upon him by the law, as incident to his station and office, to meet the necessity created by an emergency which could not be foreseen or provided for, and to prevent the property in his custody and control from being left without protection and care."

5th.—The obligation to *care* for cargo—a duty arising from the bailment—is especially preserved by the Harter Act. Section 1 prohibits and annuls all clauses tending to relieve the owner from negligence, fault, or failure in "custody, care, or proper delivery" of the goods; and Section 2 prohibits any such clauses as would relieve against the acts of others, or their obligations "to care for and properly deliver" the cargo. Hence

these clauses cannot have the effect contended for, without contravening this statute.

Act of Feby. 13, 1893, Sections 1 and 2.

Whether the suits be regarded as for non-delivery or for delay in delivery, the result is the same.

(1) Counsel for the *Styria* contend that the suits are for non-delivery (Brief for *Styria*, pp. 77-8 *et seq.*). They say:

"There was, therefore, a total breach of contract in each case, and the libellants were entitled to those damages, and only those damages, which the ship owner would be bound to pay for a total breach, as of the day of the arrival of the *Styria* in New York."

Brief for *Styria*, p. 78.
See also Brief, pp. 93 and 110.

Citing the case of Smith *v.* Tregarthen (52 L. J. Q. B., 437; 6 Asp. Mar. Cas., 137), counsel for the *Styria* say:

"The Court of Appeals should have followed the rule of the English case, and should have held that the subsequent delivery by the *Abbazia*, October 6th, could only be taken into account in reduction of the damages which accrued June 3rd for non-delivery *ex Styria*, as limited by the invoice value."

Brief for *Styria*, p. 110.

At this point the learned counsel, following the District Court's erroneous interpretation of the limitation clause, use the invoice value as the "basis" of their calculation instead of using it as "a final limit of liability."

It is the *market*, not the *invoice*, value of the goods "at the time when they ought to have arrived" that is the true measure of damages in case of non-delivery (see opinion of Day, J., in Smith *v.* Tregarthen, supra). And it is from this market value that the proceeds of sale are to be deducted, not from the invoice value.

(2) If the suits be regarded as for damages resulting from delay in delivery, the measure of damages is the difference between the value of the brimstone when it should have ar-

rived and its value when it did arrive, which gives the same result as a recovery for non-delivery with the proceeds of sale credited in accordance with the stipulation of the parties.

The provision for crediting the net proceeds was intended to take the proceeds (after payment of liens) and credit them against the amount that would be recoverable as damages on the existing state of facts, should the liability of the master be established.

The term "crediting" the proceeds meant that the proceeds as ascertained by an immediate sale on arrival would go in mitigation or reduction of damages—but what would be the exact measure or standard for those damages, the stipulation did not profess to decide. Indeed, it declared that such an arrangement by transhipment and sale should be without prejudice.

As the Circuit Court of Appeals said in its opinion on the reargument:

"When, therefore, the stipulation provided that the proceeds of the sulphur to be brought forward under its terms should be credited on account of the damages, it certainly was not intended that it should be credited twice, once by the application of the rule for determining difference of market values, and again by deducting the amount of such proceeds from the balance found upon applying the rule for ascertaining damages which the transactions and documents required."

Opinion, p. 364.

IV.—THE DECREE OF THE CIRCUIT COURT OF APPEALS IN THE ABOVE ENTITLED SUIT SHOULD BE AFFIRMED WITH COSTS TO THE LIBELLANTS, AND IN THE CROSS SUIT FOR CHARGES THE DECREE OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVERSED, AND THE DECREE OF THE DISTRICT COURT DISMISSING THE CROSS-LIBEL SHOULD BE AFFIRMED WITH COSTS.

November, 1901.

WING, PUTNAM & BURLINGHAM,
Proctors for Morgan.

CHARLES C. BURLINGHAM,
HARRINGTON PUTNAM,
Of Counsel.

APPENDIX.

Cour de Cassation.—Chambre des Requetes.
(3 mars 1897.)

Connaissement. Clause limitant la responsabilité. Avaries de route. Application. Fait personnel de l'armateur. Inapplication. Art. 1382. C. civ.

Navire: *Versailles.*

Les clauses d'un connaissement limitant en cas d'avaries le montant de l'indemnité à payer pour les marchandises, n'ont de valeur que pour les avaries de route, dont l'armateur peut s'exonérer en totalité ou en partie.

Mais elles ne peuvent être opposées pour des avaries provenant du fait personnel de l'armateur; en pareil cas, aux termes de l'article 1382 du Code civil, il est obligé de réparer le dommage dans son intégralité.

C^ie^ Générale Transatlantique *c.* Devoto.

arrêt.

Moyen unique.—Violation et fausse application des articles 1134 et 1152 du Code civil, fausse application de l'article 1382 du même code; violation des articles 103 et suivants du Code de commerce, des articles 283, 286 et 397 même code, et 7 de la loi du 20 avril 1810; en ce que ledit arrêt a formellement violé les termes clairs et précis d'un connaissement d'après lesquels l'indemnité due par la Compagnie Transatlantique pour perte et avaries de marchandises dont elle était responsable, devait être calculée d'après la valeur de ces marchandises *au port de charge.*

La Cour,

Sur le moyen unique,

Attendu qu'à la suite de l'échouement du steamer *Versailles* dans le port de Marseille, par une circonstance dont la Compagnie Transatlantique a été déclarée personnellement responsable, les réclamateurs de cafés et de sucres atteints par l'eau

(*Translation.*)

COURT OF CASSATION.—CHAMBER OF REQUESTS.

(March 3, 1897.)

Bills of Lading. Clause limiting responsibility. Damage on the voyage. How applied. Personal act of the shipowner. Not applicable. Art. 1382 Civil Code.

Ship: VERSAILLES.

The clauses of a bill of lading which limit the amount of indemnity to be paid for merchandise in case of damage are unavailable except in the case of damage in transit for which the shipowner can exonerate himself in whole or in part.

But they cannot be raised in the case of damage resulting from the personal act of the shipowner; in such a case, in conformity with the terms of Article 1382 of the Civil Code, he is obliged to make good the whole damage.

THE COMPANY TRANSATLANTIQUE *v.* DEVOTO.

DECISION.

Only ground: Violation of and improper application of Articles 1134 and 1152 of the Civil Code, improper application of Article 1382 of the same Code; violation of Articles 103 *et seq.* of the Code of Commerce, of Articles 283, 286 and 287 of the same Code, and Article 7 of the law of April 20, 1810; inasmuch as the said decision has formally violated the clear and precise terms of a bill of lading, according to which the indemnity due from the Compagnie Transatlantique for loss and damage to merchandise for which it was responsible, ought to have been calculated according to the value of the merchandise "at the loading port."

The Court

On the only ground:

Whereas in consequence of the stranding of the steamer *Versailles*, in the port of Marseilles, in consequence of a cause for which the Compagnie Transatlantique has been declared personally liable, the claimants of the coffee and the sugar

de mer ont demandé à titre de dommages-intérêts la différence entre le net produit de leurs marchandises en vente publique et le prix qu'ils en auraient retiré s'ils avaient pu les vendre à l'arrivée en état sain; que la Compagnie a opposé l'article 19 du connaissement aux termes duquel "en cas de perte ou d'avarie elle ne peut être tenue de rembourser que la valeur intrinsèque de la marchandise calculée au port de charge;"

Attendu qu'en décidant que cette clause visait seulement les avaries de route dont l'armateur pouvait se décharger en tout ou en partie, et non les avaries provenant du fait personnel de la Compagnie, obligée par l'article 1382 à réparer l'intégralité du dommage, la Cour de Paris, par arrêt du 3 mars 1896, n'a fait que préciser l'intention commune des parties et a interprété, sans la dénaturer, la convention, objet du débat;

Rejetté

Du 3 mars 1897.—Présid.; M. Tanon; MM. Letellier, rapp.; Duval, av. gén.; Me Dambeza, av.

(*Revue internationale du Droit maritime*, vol. xii, p. 660.)

damaged by sea water have claimed as their damage the difference between the net proceeds of their merchandise at public sale and the price which they would have received, if they had been able to sell them on arrival in a sound condition; the company having opposed article 19 of the bill of lading, according to the terms of which, "in case of loss or damage, it cannot be held liable to pay more than the intrinsic value of the merchandise, computed at the port of loading;"

Whereas, in deciding that this clause applied solely to damages in transit, for which the shipowner could have exempted himself in whole or in part, and not to damages resulting from the personal acts of the company, which it was obliged by Article 1382 to make good in full; the Court of Paris, by its decision of March 3, 1896, has done no more than to express more precisely the mutual intention of the parties, and has interpreted, without misconstruing the contract, the object of the controversy,

Rejected.

March 3, 1897.—Pres. M. Tanon; MM. Letellier, rapp.; Duval, Advocate General; Mr. Dambeza, Atty.

No. 692
Brief of Bowers & Reed for Resp.
Office Supreme Ct.
FILED
MAY 28 19
JAMES H. KENNEY

Supreme Court of the United States.

Filed May 28, 1900.

SCHUYLER L. PARSONS,
Libellant Appellant,

vs.

THE STEAMSHIP "STYRIA,"
&c.
A. G. SCHOPINICH, Master,
Claimant-Appellant.

692

Brief for Libellant in Opposition to Motion for Writ of Certiorari.

BOWERS & SANDS,
Proctors for Libellant,
31 Nassau Street, N. Y.

JOHN M. BOWERS,
LATHAM G. REED,
Of Counsel for Libellant.

Supreme Court of the United States.

SCHUYLER L. PARSONS,
Libellant-Appellant,

vs.

THE STEAMSHIP "STYRIA," &c.
A. G. Schopinich, Master,
Claimant-Appellant.

BRIEF FOR LIBELLANT OPPOSING MOTION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS IN THE SECOND CIRCUIT.

No conflict exists between any of the Courts of Appeal on the questions involved in this motion; nor is there any other matter involved affecting the interests of the nation in its internal or external relations—Forsyth *vs.* Hammond, 166 U. S., 506; 172 U. S., 648; 167 U. S., 454.

Notwithstanding the elaborate petition in presentation of this motion, the essential circumstances of this case give it no importance, and this Court will find on even a casual analysis, that on the merits there is nothing involved but a consideration of the weight which reports of events in the public prints, and current mercantile news at the Sicilian port of shipment concerning the action by the Italian and Spanish Governments as to allowing crude brimstone from Italy to go unmolested, should have had upon the master of the vessel, and his duty under the circumstances.

Libellants contended that as it was daily reported in the public prints at the port of shipment, which reports the master testified that he knew (and which were true reports), that efforts were being made from the moment the war broke out to let Italian sulphur pass unmolested, the master ought to have waited to see the event of these negotiations between Italy and Spain before precipitately discharging.

And so the learned District Judge held.

The Circuit Court of Appeals, however, held that the master was not bound to await the event of these negotiations (which lasted about ten days and were progressively and finally successful), but was justified in discharging immediately upon learning of the existence of the war.

What more can the claimant ask in that regard?

The Circuit Court of Appeals also held that the vessel was entitled to her expenses of discharging

What more can the claimant ask in that regard?

> *The Circuit Court of Appeals also held that the vessel ought to have reloaded before she left Sicily, because, before she left; it was publicly and officially proclaimed by the Italian Government authorities that Spain had declared Italian sulphur would not be molested by Spain, as the result of the negotiations, and that it could be safely carried.*

The Court of Appeals also held that for the expenses of such reloading the vessel would have been entitled had she reloaded and brought the cargo; and that the claimant was also entitled to be re-imbursed such expenses when it brought forward the sulphur some months later on another vessel of the same line.

What more can the claimant ask in that regard?

The whole question, then, is that involved in the ruling which we have placed in italics a few lines back.

1292

Ought the vessel to have reloaded owing to the fact that prior to her sailing sulphur had lost its contraband character?

If she neglected her duty in that regard she was liable to the libellants for their *loss of market;* but the sulphur remained the property of the libellants.

If she did not neglect a duty, *i. e.*, if there was no duty to carry the sulphur, then no liability rested upon her for any loss to the libellants.

So that it comes down to the simple question of common shipping law; if a vessel has contracted by her bill of lading to carry a cargo which immediately thereafter becomes contraband (it is immaterial whether the cargo was actually loaded and then put overboard; or had not yet loaded), is she bound to load and carry the cargo, if, prior to her sailing, the cargo becomes non-contraband? Is the contract of carriage discharged?

That was the precise situation in the case at bar, and that is the simple question involved in this case.

Other vessels loaded with brimstone sailed for American ports from Sicily between April 24th and May 8th.

The fact that the question arose out of a certain war does not, we submit, alter its simplicity or give it any greater interest than if it had arisen from facts of a pestilence or some other circumstances from which the situation might have arisen.

It will be borne in mind that the discharge in this case was not justified by the clause of the bill of lading permitting discharge if the master deems it unsafe for any reason to *enter port of discharge:* but it was justified under the clause excusing the delivery of the cargo when restraint of princes intervened.

No question of the right of transhipment is involved; there was no transhipment.

For whatever damages have accrued the responsibility

rests directly upon the managing owners, Burrell & Sons, of Glasgow, and not vicariously through the errors of judgment of the master.

They ordered the sulphur discharged immediately upon the war breaking out, and they never asked of the master, who was on the spot, as to the situation; nor did he send them any information as to the situation, nor concerning the efforts being made to let sulphur go free.

Nor did Burrell & Sons in Glasgow ever make any inquiry at all about the propriety of ordering the goods overboard until May 9th, 1898, sixteen days after they gave the master in Sicily his telegraphic orders to discharge (Record, p. 202; fol. 574).

The motion should be denied.

BOWERS & SANDS,
Proctors for Libellant Parsons.

JOHN M. BOWERS,
LATHAM G. REED,
Of Counsel.